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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DEC 8 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

IN THE MATTER OF:

TRINITY BROADCASTING OF FLORIDA, INC.
and
GLENDALE BROADCASTING COMPANY

MM DOCKET NO. 93-75

Miami, Florida

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FREE STATE REPORTING, INC.
Court Reporting Depositions
D.C. Area (301) 261-1902
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The above-entitled matter come on for pre-hearing conference pursuant to Notice before Judge Joseph Chachkin, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C., in Courtroom No. 3, on Tuesday, November 23, 1993, at 9:00 a.m.

APPEARANCES:

On behalf of Trinity Broadcasting of Florida, Inc.:

HOWARD A. TOPEL, Esquire
NATHANIEL EMMONS, Esquire
Mullin, Rhyne, Emmons and Topel
1000 Connecticut Avenue
Suite 500
Washington, D.C. 20036-5383

On behalf of Glendale Broadcasting Company:

JOHN SCHAUBLE, Esquire
MORTON L. BERFIELD, Esquire
Cohen and Berfield, P.C.
Board of Trade Building
1129 20th Street, N.W.
Washington, D.C. 20036

On behalf of the Chief, Mass Media Bureau

JAMES SHOOK, Esquire
2025 M Street, Suite #7212
Washington, D.C. 20554

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Conference Began: 9:00 a.m.	Conference Ended: 10:07 a.m.

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P R O C E E D I N G S

1
2 JUDGE CHACHKIN: May I have the appearances on
3 behalf of the parties? On behalf of Trinity Broadcasting of
4 Florida, Inc., Trinity Broadcasting Network and National
5 Minority T.V.?

6 MR. TOPEL: Yes, Your Honor. Howard Topel and
7 Nathaniel Emmons.

8 JUDGE CHACHKIN: On behalf of Glendale Broadcasting
9 Company?

10 MR. SCHAUBLE: John J. Schauble and Morton L.
11 Berfield.

12 JUDGE CHACHKIN: On behalf of the Spanish American
13 League Against Discrimination? There is no response. Mr.
14 Honig has indicated that he has no objection to the prehearing
15 conference proceeding and he didn't intend to be here today.
16 All right.

17 MR. SHOOK: Your Honor?

18 JUDGE CHACHKIN: Yes? Oh, and on behalf of the
19 Chief, Mass Media Bureau?

20 MR. SHOOK: James Shook.

21 JUDGE CHACHKIN: There are two matters here that
22 apparently the parties are having difficulty resolving. One
23 is the order of witnesses and one is the witnesses requested
24 for cross-examination. Let's take up the order of witnesses
25 first. Apparently Trinity wishes to go forward with the

1 presentation of the case -- well, let's see, Trinity wishes to
2 go forward with presenting its direct case first both with
3 respect to the issues added against it, issues contained in
4 the Designation Order, as well as with respect to the issues
5 added against Glendale, as I understand it. Glendale, on the
6 other hand, with respect to the issues added against Glendale,
7 wishes to have some control over the order of witnesses, as I
8 understand the dispute here. The general rule as far as I
9 know is that the party who has the burden of proceeding
10 controls the order of proceeding, the order of witnesses. So
11 certainly with respect to the added -- issues added against
12 Glendale, since the burden of proceeding rests with Trinity,
13 Trinity has the right to, to control the order of witnesses.
14 Now, with respect to the issues which the Commission
15 designated against Trinity, the rule would be ordinarily that
16 Glendale and SALAD, Spanish American League Against
17 Discrimination, would have the rule -- would have the right to
18 proceed in the fashion of which it wishes to proceed. There's
19 only one difficulty, namely, although Glendale had the
20 responsibility -- the burden of proceeding, what it has put
21 forth in its direct case is a, is a series of exhibits,
22 introduced exhibits. However, there are no witnesses to --
23 who are going to provide -- who are going to testify in this
24 proceeding on behalf of Glendale. Can you explain that to me?
25 How do you intend to proceed with your burden of proceeding

1 without witnesses, Mr. Schauble or Mr. Berfield or whoever
2 wants to answer that question to me?

3 MR. SCHAUBLE: Your Honor, our, our understanding
4 was that -- is that we would meet our, meet our burden of
5 proceeding through the documents and that with respect to the
6 witnesses, we knew that, we knew that --

7 JUDGE CHACHKIN: Well, wait a minute. How are you
8 -- who was going to respond to these exhibits? Nobody? You
9 mean you were just going to introduce these exhibits, and what
10 if there's an objection on the grounds that there's no
11 sponsoring witness? How is that going to be handled?

12 MR. SCHAUBLE: Your Honor, these were all documents
13 that came --

14 JUDGE CHACHKIN: What does that mean? You still --
15 you have the burden of proceeding. You have to put witnesses
16 on. At least that's the way hearings are normally tried, by
17 witnesses, not by exhibits. Now -- I mean, I -- how did you
18 intend -- how does the Bureau intend to go forward with their
19 case, putting in exhibits? What if there are objections to
20 these exhibits? Where are the sponsoring witnesses going to
21 come from?

22 MR. SHOOK: Your Honor, we didn't anticipate the
23 need for sponsoring witnesses in view of where we got the
24 documents from.

25 JUDGE CHACHKIN: What does that have to do -- what

1 | were you -- you were offering these exhibits in some cases for
2 | the truth of the matter as contained therein. Someone had to
3 | sponsor these exhibits. Someone had to testify about the
4 | matters contained in these exhibits presumably. I've never
5 | heard of a case where a party who has the burden of proceeding
6 | just puts exhibits in --

7 | MR. SHOOK: Well, Your Honor, we have no --

8 | JUDGE CHACHKIN: -- documents in without any
9 | sponsoring witnesses.

10 | MR. SHOOK: Your Honor, you'll understand that we
11 | have no burdens.

12 | JUDGE CHACHKIN: Pardon me?

13 | MR. SHOOK: We have no burdens.

14 | JUDGE CHACHKIN: The Bureau does not have a burden,
15 | I agree, but apparently Berfield is putting on a direct case.

16 | MR. SHOOK: Your Honor, yes, we believe these
17 | exhibits --

18 | JUDGE CHACHKIN: But Glendale does have a burden.
19 | Now, in view of the fact that Glendale has not given me a list
20 | of any witnesses, I don't see how they can have any control
21 | over a direct case.

22 | MR. SCHAUBLE: Your Honor, we did give you a list
23 | of witnesses.

24 | JUDGE CHACHKIN: For cross-examination. You know
25 | what cross-examination means? That means someone else is

1 putting on a direct case and you want an opportunity to cross-
2 examine them. It doesn't make them your witnesses. If you
3 want them as your witnesses, you should have listed them and
4 put them on as hostile witnesses. For cross-examination
5 doesn't give you the right to control the direct presentation.
6 Someone has to testify first before, before cross-examination
7 begins. Isn't that correct? What does cross-examination
8 mean?

9 MR. SCHAUBLE: Your Honor, there are -- it's -- the
10 example we gave in our pleading was when there's a -- in
11 proceedings for new facilities where there is a limited, where
12 there is a limited -- yeah, where there's a limited
13 partnership, for example, and only the general partner is
14 sponsoring the testimony, there are many instances where the
15 limited partner has been called for examination.

16 JUDGE CHACHKIN: Well, wait a minute. This is not a
17 hearing about a new application where the Commission said that
18 the limited partners will be required to testify on behalf of
19 the applicant seeking a grant. This is a renewal proceeding.
20 So what, what does that have to do with this proceeding?

21 MR. SCHAUBLE: Your Honor, I respectfully submit
22 that that principle is the same, that Trinity is, you know,
23 Trinity is seeking the --

24 JUDGE CHACHKIN: You have the burden of proceeding.
25 In a new proceeding the applicant has the burden of proceeding

1 and the burden of proof. This is not the case here. You have
2 the burden of proceeding. That's one important distinction.
3 If you have the burden of proceeding, then obviously it's
4 different than at a renewal proceeding where the applicant has
5 the burden of proceeding, and the Commission has required as
6 part of his burden he has to make available his limited
7 partners. What does that have to do with a renewal
8 proceeding?

9 MR. SCHAUBLE: Your Honor --

10 JUDGE CHACHKIN: The point is, Mr. Schauble, I don't
11 see how you could argue at this stage when you haven't -- the
12 day that you were required to, you haven't given me the list
13 of any witnesses to testify and all you've said you're going
14 to cross-examine Trinity's witnesses, you have the right to
15 control witnesses. If you want to put on witnesses, then you
16 have a right to control witnesses and you certainly had the
17 right, if you wished, to call all of Trinity's principles and
18 all of their employees and anyone else you wanted as your
19 witnesses. Then you would have controlled witnesses which you
20 should have done since it's your direct case. Now, Mr.
21 Berfield knows that. He's an experienced trial attorney.
22 He's tried many cases. He knows when you have the burden of
23 proceeding it's necessary for you to put on the witnesses.
24 But since you haven't done that, obviously Trinity has put on
25 a direct case. I don't know if they were required to put on a

1 direct case. They didn't have the burden of proceeding, but
2 they've done it. And it seems to me that all you -- you
3 can't, you can't argue with their right to control witnesses.
4 They're the only ones who have witnesses. You don't have any
5 witnesses. So what I'm saying is as far as your objection is
6 concerned with respect to Trinity going forward with its
7 witnesses, there's no basis for your objection since you
8 haven't proposed to present any witnesses. And so here we
9 can't follow the traditional rule of the party who has the
10 burden of proceeding will control witnesses since you haven't
11 presented any witnesses and all you can do now is rely on
12 cross-examination to meet your burden of proceeding. That's
13 all you have left and that's only because Trinity has decided
14 to put on a direct case. If Trinity hadn't put on a direct
15 case and hadn't offered any exhibits, I don't know what you
16 would have done to meet your burden of proceeding without any
17 witnesses. So what I'm saying in sum and substance is that
18 Trinity can control the witnesses insofar as the added issues
19 and so far as the, the issues added against Trinity in the
20 Designation Order under the circumstances which prevail here.
21 Now, let's get to witnesses for cross-examination.

22 MR. EMMONS: Your Honor, may I ask for clarification
23 --

24 JUDGE CHACHKIN: Yes.

25 MR. EMMONS: -- as to the issue -- as to the order

1 of witnesses on the -- what I call the Glendale issue?

2 JUDGE CHACHKIN: You have the right to -- you have
3 the right since you have the burden of proceeding.

4 MR. EMMONS: That's what I understood, Your Honor.

5 JUDGE CHACHKIN: You have the right to call any
6 witnesses you want to meet your burden. Afterwards if Trinity
7 wants to call its witnesses, either the same witnesses over
8 again as part of its direct case, it can do so or it could
9 limit itself to cross-examination, but since you have the
10 burden of proceeding you have a right to control the
11 witnesses. And because of the default of Glendale you also
12 have the right to control the witnesses in terms of your --
13 the issues designated against you in the Designation Order.
14 Now, turning to the witnesses which Glendale wishes to cross-
15 examine and which the Bureau -- I assume the -- insofar as the
16 dispute with the Bureau, I guess it only rests on, or concerns
17 Mr. Aguillar has had? Is that correct?

18 MR. SHOOK: There are two individuals --

19 MR. EMMONS: Two, Your Honor.

20 MR. SHOOK: -- Mr. Aguillar and Mr. W. Ben Miller.

21 MR. EMMONS: That's correct, Your Honor, those two.

22 JUDGE CHACHKIN: Well, I noticed that in your direct
23 case Trinity has included questions and answers directed to
24 Mr. Aguillar. Also, you intend to put in his deposition.
25 Now, I don't know how you propose to put on his deposition and

1 put on his questions and answers if he's not available for
2 cross-examination. The rule is very clear. If you want to
3 put in a -- you want to put in direct testimony of a witness,
4 then you have to make them available for cross-examination.
5 If he's not available for cross-examination, I won't receive
6 the exhibit. So the choice is yours.

7 MR. TOPEL: Well, Your Honor, this comes under my
8 category in the case, the issue that I'm handling, and your
9 ruling on that is very clear and I'm not inclined to engage in
10 significant argument with you. Our objection was based on the
11 fact that all the questions and answers that are in the
12 depositions were questions and answers that the adverse
13 parties asked Pastor Aguillar and no indication was made as to
14 what additional substantive information is required from the
15 pastor and, given the distance of travel, there ought to be
16 some showing that, that additional evidence is really required
17 from him. And so our position was that, and is, that the
18 deposition testimony, since it was a hostile deposition
19 conducted almost entirely by Glendale with, with a full
20 examination by Mr. Shook, that that is the equivalent of their
21 examination of Pastor Aguillar and there ought to be some
22 substantive reason articulated as to what more they want from
23 him. We've included all the information that they solicited
24 from him.

25 JUDGE CHACKIN: Well, I'll let the Bureau respond,

1 but I should say briefly ordinarily a deposition does not
2 substitute for the hearing, particularly where credibility may
3 be a factor. Does the Bureau have any response, Mr. Shook?

4 MR. SHOOK: Well, Your Honor, I believe -- and if
5 I'm mischaracterizing Mr. Topel's argument, I'm sure he'll let
6 you know -- we did ask all the questions that we could think
7 of at the time, but that doesn't mean that that covered the
8 universe of questions that we would want to ask and then have
9 you be aware of during the course of the hearing. So I cannot
10 subscribe to a view that every possible piece of information
11 that should be made available to you through Pastor Aguillar
12 was handled at the deposition.

13 JUDGE CHACHKIN: Well, I'm satisfied that Mr.
14 Aguillar is, it seems to me, an important witness and since
15 the parties feel it's necessary for me to observe his demeanor
16 and the Bureau at least has made clear that it has other
17 questions, and normally depositions do not serve as a
18 substitute for a hearing testimony unless the parties agree by
19 stipulation. In view of all those factors, Mr. Aguillar will
20 be required to be available for cross-examination if you want
21 to put in his exhibit. Who was the other individual that the
22 Bureau wanted?

23 MR. SHOOK: Mr. Miller.

24 JUDGE CHACHKIN: And the case of Mr. Miller, is that
25 a situation where Mr. Miller is not putting in any direct

1 testimony?

2 MR. SHOOK: That is the case, Your Honor.

3 JUDGE CHACHKIN: And what is the basis for your
4 requesting him to be cross-examined?

5 MR. SHOOK: Your Honor, simply to have as full and
6 complete a record as possible so that you can have the benefit
7 of having the, you know, best information upon which to make
8 your ruling.

9 JUDGE CHACHKIN: Well, that's not -- you know, the
10 question is not whether we should have a full and complete
11 record. The question is who has the responsibility for
12 putting on the witnesses. If Mr. Miller does not put in a
13 direct testimony and presumably -- I don't -- I haven't
14 reviewed all the exhibits. Mr. Miller is not necessary to
15 sponsor any of the exhibits and if you want to make -- the
16 Bureau wants a complete record or Glendale wants a complete
17 record, obviously the onus rests on them to put on these
18 individuals.

19 MR. SHOOK: Your Honor, we can deal with it another
20 way if Mr. Miller does not appear.

21 JUDGE CHACHKIN: All right. What's your position,
22 Mr. Schauble?

23 MR. SCHAUBLE: Your Honor, we submit that this is a
24 situation where Mr. Miller's testimony would, would lead to
25 the development of a full and complete record.

1 JUDGE CHACHKIN: Well, that's not the issue here.
2 That's not the issue. The issue is who has the onus for
3 putting on Mr. Miller. If he's not a principle and he's not
4 sponsored any exhibits, then if you want a full and complete
5 record then you can put him on and I'll be glad to sign a
6 subpoena.

7 MR. SCHAUBLE: Very well, Your Honor.

8 JUDGE CHACHKIN: Do you want me to sign a subpoena
9 for him?

10 MR. SCHAUBLE: Your Honor, we'd like to consider the
11 matter a little further.

12 JUDGE CHACHKIN: Well, if the Bureau or Glendale
13 wants me to sign a subpoena, I'll be happy to sign a subpoena
14 if they feel he has relevant testimony. What are the other
15 witnesses you want for cross-examination that there's an
16 objection to? Let's go over that list now with Glendale.
17 Again, if these -- I could just say generally speaking that if
18 these are individuals who have not sponsored any exhibits,
19 then if you want them, as you say, to make a full and complete
20 record, Mr. Schauble, then I'll be happy to sign a subpoena
21 and you can put them on as your witnesses if you feel they
22 have relevant testimony. Let's go over the list here. I
23 guess Alan Brown -- is that a situation where Mr. Brown has
24 not sponsored any exhibits?

25 MR. SCHAUBLE: Yes, Your Honor. That whole listing

1 that runs from Alan Brown, Terrence Hickey, Philip Crouch, Ben
2 Miller, George Horvath, Matthew Crouch and Charlene Williams
3 are all people from whom no direct testimony has been offered.

4 JUDGE CHACHKIN: Well, how can you cross-examine
5 someone when there's no direct testimony, Mr. Schauble?

6 MR. SCHAUBLE: Your Honor, it was our, it was our
7 understanding that the -- that it was an analogous situation
8 where somebody under -- somebody who had a relationship to
9 Trinity and/or NMTV and was analogous to the situation of a
10 limited partner, but if Your Honor is ruling that we -- that
11 Glendale should be responsible for subpoenaing these
12 individuals, I think we might want to take that matter under
13 advisement as to the -- as to whether we want to issue
14 subpoena requests for these individuals.

15 JUDGE CHACHKIN: Well, you have the burden of
16 proceeding. If you feel these witnesses have relevant
17 testimony, then obviously I'll be happy to sign a subpoena.
18 You can bring them and put them on as your witnesses.

19 MR. TOPEL: Your Honor, may I request that --

20 JUDGE CHACHKIN: Yes.

21 MR. TOPEL: -- ordinarily subpoenas are done ex
22 parte. Given the fact that the hearing commences six days
23 from today and Thanksgiving weekend intervenes, may we have
24 the courtesy of having Glendale advise us and serve us with
25 copies of any subpoena requests so that the witnesses can be

1 | heard on their ability to appear and so we may be heard if
2 | there's a new argument going to be made concerning the order
3 | of witnesses?

4 | JUDGE CHACHKIN: Well, there's not going to be any
5 | argument concerning the order of witnesses. If you don't
6 | agree with Glendale, if you can't reach an agreement with
7 | Glendale, presumably they will go on after your -- you've
8 | completed your witnesses unless you can reach some
9 | accommodation with them to the benefit of the witnesses
10 | perhaps.

11 | MR. TOPEL: Thank you, Your Honor.

12 | JUDGE CHACHKIN: But there's no -- I don't see any
13 | argument about the right for them to call these witnesses. If
14 | they believe they have relevant testimony I will sign a
15 | subpoena. Now, if they want to contact you to facilitate
16 | their appearances rather than going through someone serving
17 | the subpoena, that's up to them, but we'll treat it as any
18 | other situation where subpoenas are served.

19 | MR. TOPEL: The reason --

20 | JUDGE CHACHKIN: These are not depositions. This is
21 | at the hearing.

22 | MR. TOPEL: The reason I raised it is that I do
23 | think that if we get to that point the issue of relevance and
24 | materiality is a matter that properly would be the matter of
25 | some controversy.

1 JUDGE CHACHKIN: Well, I'm not going to get into the
2 issue of relevance and materiality. If they believe that they
3 have relevant testimony, they will come -- I will sign a
4 subpoena and they will testify, and if you believe that the
5 questions and answers -- questions are not relevant, you can
6 object at that point, but they have the right as lawyers to
7 call the witnesses they feel have relevant testimony. And as
8 far as I can see all these individuals are involved. They're
9 not strangers to this transaction. I mean, you, you may feel
10 that they're not necessary, but certainly they're individuals
11 who participated in some way or fashion so they certainly have
12 relevant testimony. Now, whether it could be -- in fact,
13 weren't most of them deposed?

14 MR. TOPEL: Yes.

15 JUDGE CHACHKIN: But they -- as I again, they have
16 the burden of proceeding. Glendale has the burden of
17 proceeding. If he wishes to call them as his witnesses he can
18 do so. Are there any other matters that we have to take up
19 this morning?

20 MR. SCHAUBLE: Your Honor, I believe there's the
21 matter of cross-examination of Mr. Rick and Mr. March.

22 JUDGE CHACHKIN: What is the situation there?

23 MR. SCHAUBLE: Your Honor --

24 JUDGE CHACHKIN: I've already indicated that as far
25 as the order of witnesses are concerned. Now --

1 MR. EMMONS: No. It's not the order, Your Honor.

2 JUDGE CHACHKIN: If it's what --

3 MR. EMMONS: It's whether Mr. Rick and Mr. March --

4 JUDGE CHACHKIN: Well, I'm making it very clear. If
5 you want to put in their testimony, they have to be available
6 for cross-examination. They certainly -- credibility is a
7 factor here.

8 MR. EMMONS: Your Honor, with respect to those two
9 gentlemen who are not now, nor have ever had any association
10 with any party in this case, they are truly non-party
11 witnesses.

12 JUDGE CHACHKIN: What does that have to do?

13 MR. EMMONS: Well, there's been no --

14 JUDGE CHACHKIN: I mean, the issue relates to
15 whether they're telling the truth or whether the, or whether
16 the employees or agents of Glendale are telling the truth
17 about what took place.

18 MR. EMMONS: Glendale has not suggested in any
19 pleading I've seen that these two gentlemen are not telling
20 the truth, nor have they suggested that there is any need for
21 you to observe the demeanor of these two witnesses.

22 JUDGE CHACHKIN: Well, let's, let's find out. What
23 is the position of Glendale?

24 MR. SCHAUBLE: Your Honor, I think at a minimum that
25 Your Honor has previously recognized the purpose of the

1 deposition is to not -- not to ask every single piece of
2 information, but to obtain additional information and I think
3 our position is, as the exhibits offered by Trinity do not
4 tell the complete and entire story, and as the exhibit
5 currently stands I think additional testimony would be needed
6 for these individuals to develop a full, complete record
7 concerning what they knew and the state of their memory and
8 their involvement in this matter.

9 JUDGE CHACHKIN: Well, we're dealing with a simple
10 situation. I mean, whether there were -- about discussions
11 that were had, alleged discussions, what took place in these
12 discussions, one or two discussions concerning the use of the
13 tower. Isn't that what we're dealing with here, the use of
14 the site? Now, were these matters covered in the, in the
15 depositions and is there a need, a need to observe these
16 witnesses? What is the position? I assume that if there --
17 the matters involved there were covered at the deposition or
18 weren't they covered at the deposition?

19 MR. EMMONS: They were.

20 MR. SCHAUBLE: Your Honor, there were certain -- one
21 particular concern that I have is a certain -- certain
22 questions asked by Mr. Emmons at the deposition concerning
23 matters that occurred back in 1989 when the original site
24 contact was made and I think in our judgment, at least with
25 respect to that portion of the exhibit, that if that, if that

1 matter is going to be put into evidence, I think additional
2 questions would need to be asked of the, of the witnesses on
3 that matter.

4 JUDGE CHACHKIN: Are you saying that it's your
5 position that it was covered and that area is not relevant?

6 MR. SCHAUBLE: Yes, it is, Your Honor.

7 JUDGE CHACHKIN: Well, if it's not relevant, then
8 there's no need for the witness to testify. I mean, then
9 you'd move to -- I assume you will object to that portion of
10 the deposition if that's being offered.

11 MR. SCHAUBLE: Your Honor, I think Mr. Emmons would
12 obviously take the position that the matter he has put in is
13 relevant and I think at least until we get a ruling from Your
14 Honor on that matter, I think we have to reserve judgment in
15 that regard.

16 JUDGE CHACHKIN: Well, once you indicate that if, if
17 there are matters here in the deposition that don't strictly
18 concern the transactions covered by addition of issues and
19 they wish to put in such evidence and obviously you haven't
20 had a full opportunity to question the witness about those
21 matters, they will have to make available the witnesses for
22 cross-examination with respect to those matters if I agree
23 with them and, and receive that material on the deposition.

24 MR. SCHAUBLE: One other matter, Your Honor, is I
25 also believe their -- they did not put in the entire

1 deposition. They put in other portions of the deposition, so
2 I --

3 JUDGE CHACHKIN: Well, let me indicate that if I'm
4 going to receive the deposition in lieu of their testimony,
5 the entire deposition would have to go in if that's what's
6 going to happen here.

7 MR. SCHAUBLE: Well, subject to --

8 JUDGE CHACHKIN: Subject -- of course, subject to
9 any objections on the grounds of relevance. Either that or
10 you could offer portions of the, of the deposition which you
11 feel should also be included with the material that they've
12 offered. We could follow two procedures. You could put in
13 the entire deposition and I can make rulings on the entire
14 deposition or you could introduce those portions of the
15 deposition which you feel are relevant which are not being
16 introduced by Trinity.

17 MR. SCHAUBLE: So, Your Honor, I think -- I don't
18 it's possible for us to make a judgment on this until we get
19 Your Honor's rulings on some of the relevance objections we're
20 going to have at the admissions session.

21 JUDGE CHACHKIN: Well, I -- is there any -- well, so
22 you do agree, I gather, with Trinity that there is no need for
23 me to observe the demeanor of these witnesses? Is that what
24 you're saying? There are no credibility questions necessary
25 for me to see these witnesses?

1 MR. SCHAUBLE: There may be. I mean, my primary
2 concern is in terms of, you know, whether there's going to be
3 a complete record in terms of the -- in terms of what these
4 two witnesses know. They're often --

5 JUDGE CHACHKIN: Look, I'm affording you an
6 opportunity now to state why you need these witnesses and why
7 they need to testify. If you can give me some reason,
8 justification, then I'm prepared to require them to be
9 available for cross-examination. If you're not prepared, then
10 obviously there's no reason to bring them for cross-
11 examination. So, Mr. Schauble, what is your position? Why,
12 why do these witnesses have to be here for cross-examination?

13 MR. SCHAUBLE: Your Honor, first of all --

14 JUDGE CHACHKIN: Why can't the deposition suffice?
15 That's the, the nub of it?

16 MR. SCHAUBLE: Your Honor, first of all, as I
17 understand the, the Commission's rule, that if they're going
18 to offer the deposition -- under 1.321(d)(3), that if they're
19 going to offer the deposition that the witness has to be made
20 available for cross-examination. That is mandatory under the
21 rules.

22 JUDGE CHACHKIN: No. The Commission has made clear
23 that the judge has the discretion to determine whether it's
24 necessary for a witness to be available for cross-examination
25 and I'm asking you your reasons why he should be made

1 available for cross-examination. If you can give me some
2 reason, some justification, then I will make them available
3 for cross-examination or else the exhibit I won't allow in the
4 direct testimony. If you feel that's the situation where it
5 should be available -- made available for cross-examination it
6 will be, if you can demonstrate that.

7 MR. SCHAUBLE: Your Honor, we believe that the
8 exhibit as it currently stands is not a complete recitation of
9 the pertinent facts involved, and with respect to the, the one
10 matter that -- there is -- there will be a dispute over the
11 relevance of that. However, if Your Honor decides that the
12 matter is relevant, we think there are additional -- we think
13 that the record in that respect is not complete and that there
14 would be a need for an additional examination of these
15 witnesses concerning the contacts, the original contacts with
16 the site owners.

17 JUDGE CHACHKIN: The position of Trinity is what,
18 that they want to offer portions of the deposition? Is that
19 --

20 MR. EMMONS: We have offered portions of it -- of
21 the deposition, Your Honor, and, frankly, I had anticipated
22 that, that Glendale would, in turn, want to offer either all
23 or part of the rest of the deposition. We certainly have no
24 objection to that at all. I don't -- I haven't heard anything
25 that suggests to me that there is anything -- any further

1 information that is required to have a complete record in
2 this. I do know, and I was at that deposition, of course, Mr.
3 Cohen questioned both of those witnesses extensively and he
4 did, if my recollection serves, question them on the matter
5 that Mr. Schauble is now isolating on which is the original
6 contacts with those two gentlemen in 1989. And so I think if
7 the entire deposition is put in, if that's what Glendale
8 wishes to do, that would create a full and complete record.
9 And I have not certainly heard anything at all yet that
10 suggests there's any credibility or demeanor question here at
11 all. These two gentlemen have absolutely nothing to do with
12 this case, don't want to be involved in the case, are
13 testifying to the best of their knowledge and recollection,
14 and I think that it's all there in the deposition.

15 MR. SCHAUBLE: Your Honor, there's also -- in
16 addition to the deposition there's also the matter of an
17 affidavit that's being offered into evidence here. Now, it's
18 being offered as a deposition exhibit, but I don't see
19 anything under the Commission's rules which would -- you know,
20 the deposition is one matter, but I think the affidavits that
21 are being offered by these two individuals are another matter.
22 I don't see anything which would allow an affidavit to be
23 allowed in without cross-examination.

24 MR. EMMONS: Your Honor, the affidavit for each of
25 the two individuals was introduced as deposition exhibit in